MOHAMED YUSOF v. TIN HUCK & ANOR.

[O.C.J. (Suffian F.J.) August 10 and 19, 1972]

[Kuala Lumpur — Raub High Court Civil Suit No. 20 of 1969]

Damages — Assessment of damages — Fracture of left femur — Compulsory retirement — Whether gratuity and pension should be brought into account — Payment of interest.

In this case the plaintiff a police constable had been injured in a road accident. He suffered a fracture of the left femur and abrasions. As a result of his injuries he was retired from the Police Force. Liability was admitted and the only question for determination was the question of damages.

Held: (1) the gratuity and pension received by the plaintiff from the Government should not be brought into account in assessing damages for loss of earnings;

(2) in the circumstances the plaintiff would be awarded $27,500 for loss of earnings, $10,000 for pain and suffering and loss of amenities and special damages;

(3) interest is awarded to a plaintiff for being kept out of money which ought to have been paid to him and in this case interest would be awarded on the $10,000 from the date of the service of the writ until judgment but not on the general damages of $27,500 for loss of future earnings. Interest on the special damages would be payable from the date the amount was claimed that is at the date of the amendment of the writ.

Cases referred to:-

(1) *Browing* v. *War Office* [1962] 3 All E.R. 1089.

(2) *Parry* v. *Cleaver* [1969] 1 All E.R. 555.

(3) *Raja Mokhtar* v. *Public Trustee* [1970] 2 M.L.J. 151.

(4) *Anna Yong* v. *Government of Sarawak* [1972] 1 M.L.J. 103.

(5) *Parry* v. *Cleaver* [1967] 2 All E.R. 1168.

(6) *Jefford & Anor.* v. *Gee* [1970] 2 W.L.R. 702.

CIVIL SUIT.

Inderjit Singh for the plaintiff.

V. P. Nathan for the defendant.

Suffian F.J.: On 12th August, 1968, the plaintiff, a police constable, was on duty at a road block at the 7th milestone Bentong-Kuala Lumpur road when he was knocked down and injured by a lorry driven by the first and owned by the second defendant. His injuries were such that he was retired early from the force.

Liability is admitted and the only question for my determination is the quantum of damages.

On being admitted to the Bentong hospital on the day of the accident the plaintiff was found to have three injuries —

1. fracture of left femur;
2. abrasion of right elbow; and
3. abrasion of left cheek.

On the following day he was transferred to the Kuala Lumpur General Hospital where he was put under the charge of Dr. Mahmood Merican (PW1).

Another specialist, Dr. Ng, also examined him. That was on 1st April, 1969, and his report, which is not disputed, is given in paragraph 3 of the statement of claim —

"On examination, he limps and walks with a stick. There is no shortening of his left lower limb. There is a long operation scar on the outer side of the left thigh extending on to the knee joint, and there is swelling of the left leg and foot.

The left hip joint is unaffected. The left knee joint shows evidence of csteo-arthritis; it cannot be fully extended, and can only be flexed to the position of about 80 degrees. This accounts for his limp, and pain on walking requiring the aid of a walking-stick. This damage to the knee is permanent, and he will not be able to squat, nor can he run or walk briskly.

X-rays confirm a healed fracture of the lower one-third of the left femur, which has been plated. This has healed well. However, the site of the fracture, the operation required, followed by immobilization in plaster-of-Paris, has caused some damage to the left knee joint. with consequent arthritis."

Dr. Merican himself gives evidence at the trial which I accept. He says that he examined the plaintiff on 13th August, 1970, and finally in conjunction with another doctor as required by Government regulations on 27th May, 1971, to report at the request of Government whether the plaintiff was fit to continue in the Police Force; that the fracture of the left femur had united in a satisfactory position; that there was considerable wastage of the left thigh (the girth being 2 inches less than that of the other thigh); that the extension at the knee was limited by 5 degrees and the flexion of the knee by 30 degrees; that he certified him permanently unfit for duty as a police constable.

I find that the damage to the knee is permanent and that the plaintiff will not be able to squat or run or walk briskly, but I do not think that this has in any way reduced his expectation of life.

I find that, though permanently unfit for police duties, the plaintiff could be employed in work not involving walking or extensive movement; that he would be fit for sedentary work, for instance, as a telephone operator, but that his chances of such employment are minimal in view of his education and the present employment position in the country.

As a result of the medical reports, the plaintiff was compulsorily retired from the Police Force on 1st November, 1970, when he was aged 42.

He was born on 31st December, 1928 (according to Exhibit P1) and joined the Police Force on 1st August, 1952, and had served 18 years and 3 months prior to his compulsory retirement. He was then a mere police constable and had never enjoyed any rank higher than that. His last pay on 30th October, 1970, was $270 all in, the maximum of the Suffian scale for police constables.

On his compulsory retirement he could have been granted a pension of $886.95 per year, but he opted to commute a quarter of this, whereupon he was paid a lump sum gratuity of $2,771.75 and a pension for life of $655.21 per annum or $55.43 per month under the Pensions Ordinance.

If he had not been injured, he could have opted to retire on a pension at age 45. On the other hand he could also have worked until age 55, the compulsory retiring age. If he had not been retired at age 42 and had instead worked on until age 55, apart from drawing full pay until age 55 he would at that age have been paid a lump sum gratuity of $4,771.38 and a monthly pension of $95.43.

I find as a fact that his chances of promotion beyond the rank of police constable are nil, considering that after 18 years' service he was still a P.C.

I find that the gratuity and pension payable to the plaintiff was a non-contributory one.

I find that at any time in the future it would be open to the plaintiff to present a medical certificate to Government and claim an injury allowance under Pension Regulation 19(1) (L.N. 233/1957) in addition to his pension, provided he fulfils all the conditions set out in that regulation, and the minimum he would be eligible for by way of an injury allowance is $202.50 per year.

I find that the gratuity and the pension paid to the plaintiff are ex-gratia and may be cut down or cut off completely by Government, but the chances of this happening are remote.

I find that Government is entitled to order the plaintiff to report back for duty, but that the chances of Government doing so are remote.

It is common ground that general damages are payable to the plaintiff under two heads:

(a) for loss of future earnings; and

(b) for pain and suffering and loss of amenities.

A. *Loss of earnings*

It is submitted on behalf of the defendants that the gratuity and pension received by the plaintiff from Government should be brought into account in assessing damage for loss of earnings. I have considered all the cases cited, namely, *Browning* v. *War Office*[1]; *Parry* v. *Cleaver*,[2] a House of Lords decision; *Raja Mokhtar*[3] and *Anna Yong*;[4] and have come to the conclusion that the gratuity and pension received should not be brought into account in assessing the damages under this head.

In assessing the financial loss suffered by the plaintiff I find it convenient to deal with it in separate periods as was done by Lord Denning M.R. in *Parry's* case in the Court of Appeal.[5]

Period 1

This is the period from the date of the accident (12th August, 1968) to the date of the trial (5th July, 1972). During this period the plaintiff received his full salary up to 30th October, 1970, when he was discharged. So he suffered no financial loss in that period, and he claims nothing. Then from 1st November, 1970, to the trial on 5th July, 1972, he suffered loss of $270 per month. As against this, he received a lump sum gratuity of $2,771.75 as well as a monthly pension of $55.43 for the rest of the days. But ignoring these benefits (as I have decided it is proper to do), his loss comes to $5,443.55: this is actual and constitutes special, not general, damage.

Period 2

This is the period from the date of the trial (5th July, 1972) to the time when he would have retired from the police at the age of 55 (on 31st December, 1983, as he was born on 31st December, 1928, according to Exhibit P1). He suffers loss during this period since he receives no salary at all, but as against this he has received a gratuity and will continue to receive a monthly pension as from the date of his retirement: both these amounts however have to be ignored, and so his loss during that period comes to $37,225.16.

Period 3

This is the period from age 55 (when he would have retired from the police force) till his death at, say, the age of 60. He suffers no loss of salary during this period, as he would have had to retire anyhow, but if he had retired at age 55 he would have received a bigger lump sum gratuity and a bigger monthly pension. His loss is therefore the difference between what his gratuity and pension would have been at age 55 if he had not been injured (lump sum of $4,771.38 and monthly $95.43) and the gratuity which in fact he received and the pension which in fact he has received and will continue to receive on earlier discharge at the age of 42 ($2,771.75 and monthly $55.43). Following the House of Lords' decision in *Parry's* case, I hold that the gratuity he has received and the monthly pension which he has been receiving should be taken into account, and doing so I find that his loss comes to $4,399.63.

The total for the three periods comes to $47,068.34 as follows —

Period 1 (special damage)	$ 5,443.55
Period 2 (loss till retirement at age 55)	37,225.16
Period 3 (loss from age 55 until age 60)	4,399.63
Total =	$47,068.34

The last two figures totalling $41,624.79 must be scaled down so as to allow for contingencies (for instance, he might die at an early age owing to extraneous causes altogether; he might be maimed and disabled from work while for instance arresting an armed robber or due to other hazards of his employment; and so forth) and give effect to the fact that payment is made at once, *i.e.*, to reduce them to present value. I would scale them down to $27,500.

B. *Pain and suffering and loss of amenities*

Two cases noted in the third edition of Dr. Mallal's Digest, paragraphs 3652, 3658, were cited on behalf of the plaintiff and it was said that between $12,000 and $15,000 would be a fair award under this head and two cases at paragraphs 3738 and 3740 were cited on behalf of the defendants and it was said that an award of between $4,000 and $5,000 would be fair. Considering the nature of the injuries suffered and the operations made necessary and the time spent by the plaintiff in hospital (four months) and the permanency of the limp, I consider $10,000 a fair award under this head.

I therefore order the defendants to pay —

(1) special damages (agreed) in respect of the first three items in the statement of claim	$ 750.00
(2) special damages in respect of actual loss of salary from retirement until date of trial (period 1 above)	$ 5,443.55
(3) general damages (periods 2 and 3 above)	$27,500.00
(4) general damages (pain and suffering, etc.)	$10,000.00
Total =	$43,693.55

The defendants shall also pay the taxed costs of this suit.

I shall give my decision on interest on Saturday, 19th August, 1972.

Suffian F.J. (delivering further judgment on August 19, 1972): When I delivered judgment on 10th August, 1972, I was told for the first time that the defendants had on 25th November, 1969, paid into court $4,500 in full settlement of the plaintiff's claim as it then stood, and Mr. V. P. Nathan on behalf of the defendants submitted that no interest should be awarded on (a) that amount, nor on (b) the special damages of $5,443.55 awarded in respect of earnings actually lost between the plaintiff's retirement and the date of the trial, because this amount was not claimed by the plaintiff in his pleadings until the amendment on 1st June, 1972, with leave granted on 1st May, 1972, of his statement of claim.

It would appear that by his original pleadings the plaintiff claimed only special damages, and claimed only general damages for pain and suffering and that he made no claim in respect of salaries lost between the date of his retirement and the date of the trial nor in respect of loss of future earnings, and Mr. Nathan told me that that was why the defendants paid into court only $4,500.

On behalf of the plaintiff Mr. Inderjit Singh submitted that interest should be awarded on both amounts.

He said that interest should be awarded on the $10,000 general damages ordered to be paid in respect of the plaintiff's pain and suffering, because the defendants had paid into court only $4,500.

As regards interest on the special damages of $5,443.55 Mr. Inderjit Singh said that when the suit was first filed on 29th April, 1969, there was no claim for damages in respect of actual loss of salaries nor in respect of loss of future earnings because the plaintiff was then still in the Police Force, that the statement of claim was amended to include these damages after the plaintiff had been forced to retire from the Force, that after the amendment the defendants could have paid a further sum to cover these claims but failed to do so, and that therefore the defendants should pay interest on the sum awarded in respect of salaries actually lost and in respect of loss of future earnings.

The principles on which interest should be awarded are clearly set out by Lord Denning M.R. in *Jefford & Another* v. *Gee*;[6] and briefly they are these, that —

(a) interest should not be awarded as compensation for the damages done, and

(b) it should only be awarded to a plaintiff for being kept out of money which ought to have been paid to him.

Lord Denning then explained the detailed working of these principles under various heads. Please see [1970] 1 M.L.J. xli.

As regards the $10,000 general damages awarded in respect of the plaintiff's pain and suffering and loss of amenities, interest should be awarded from the time when the defendants ought to have paid it, but did not: for it is only from that time that the plaintiff can be said to have been kept out of the money. Normally interest should run from the date of the service of the writ.

The plaintiff's original pleadings covered a claim under this head. To meet that claim the defendants paid into court the sum of $4,500. I am of the opinion that the plaintiff should have received $10,000. I therefore order that the defendants should pay interest at 6% per annum on $10,000 from the date of the service of the writ until judgment.

As regards the $5,443.55 special damages awarded in respect of earnings actually lost between the plaintiff's retirement and the date of the trial, here again interest should run from the time when the defendants ought to have paid it, but did not, for until then the plaintiff cannot be said to have been kept out of the money. I am of the opinion that the defendants ought to have paid this not on the date of the service of the writ (the plaintiff's claim did not then cover this head of damage) but on the date of the amendment (when the defendants first knew of the claim and ought therefore to have paid the plaintiff). Accordingly I order that the defendants pay interest on this amount ($5,443.55) from the date of the amendment to the date of judgment, and as regards the rate I am of the opinion that in the circumstances of this case 6% would be more just than 3% per annum and I order accordingly.

There shall be no interest on the other two heads of damage — not on the agreed special damages of $750 because Mr. Inderjit Singh on the plaintiff's behalf disclaimed interest, the amount involved being (he said) small; nor on the general damages of $27,500 awarded for loss of future earnings, because the plaintiff has not been kept out of this money (on the contrary he will receive it in advance).

The amount ($4,500) paid into court on 25th November, 1969, is ordered to be paid to the plaintiff.

Order accordingly.

Solicitors: *Inderjit Singh; Richard Talalla & Co.*

MENAKA v. NG SIEW SAN

[O.C.J. (Mohamad Azmi J.) August 12, 1972]

[Kuala Lumpur — Originating Summons No. 59 of 1971]

Contract — Moneylenders — Moneylender lending money in other than authorised name — Whether transaction void for illegality — Whether transaction unenforceable — Whether court can grant ancillary relief and order restitution of money — Contracts (Malay States) Ordinance, 1950, s. 66 — Moneylenders Ordinance, 1951, s. 8(b) & (c).

The applicant and another person were licenced as moneylenders under the authorised name of "A.R. PR.M. Firm". The applicant lent to the respondent a sum of money and the respondent charged his land to the applicant as security for the loan. Both the memorandum of loan and the charge were executed by the attorney of the applicant. The respondent having failed to pay the principal sum and interest due the applicant applied for an order to sell the